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No. 504

Supreme Court of the United States

OCTOBER TERM, 1957

GERTRUDE MACDONALD

v.

LA SALLE NATIONAL BANK, Conservator

Appeal from the Supreme Court of Illinois

Statement as to Jurisdiction

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Evanston, Illinois

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Supreme Court of the United States

OCTOBER TERM, 1957

GERTRUDE MACDONALD

v.

LA SALLE NATIONAL BANK, Conservator

Appeal from the Supreme Court of Illinois

Statement as to Jurisdiction

Opinion Below.

The opinion of the Supreme Court of Illinois in the above entitled cause is reported in *Macdonald* v. *La Salle National Bank*, 11 Ill. (2d) 122, and a copy of the opinion of the Supreme Court of Illinois is appended to this Jurisdictional Statement.

Jurisdiction.

On May 13, 1955, Gertrude Macdonald filed, in the Probate Court of Cook County, Illinois, a petition to vacate and set aside the appointment of conservators of her estate, said appointment being void and the Probate Court having no jurisdiction. Rec. 3 (5-14). On June 22, 1955, the Probate Court of Cook County, Illinois, dismissed the petition and an appeal was taken to the Circuit Court of Cook County, Illinois. Rec. 3 (15). On June 27, 1956, the Circuit Court of Cook County dismissed and denied the petition of Gertrude Macdonald. (Rec. 3 (17-24)). From the order of the Circuit Court of Cook County an appeal was prosecuted to the Supreme Court of Illinois. (Rec. 3 (25)).

On March 20, 1957, the Supreme Court of Illinois entered judgment, affirming the judgment of the Circuit Court of Cook County, Illinois, a copy of which judgment is appended to this Jurisdictional Statement. Rec. 8. On April 4, 1957, a petition for rehearing was filed, Rec. 9-13, and said petition for rehearing was denied by the Supreme Court of Illinois on May 20, 1957. Rec. 14. On August 1, 1957, Gertrude Macdonald filed in the Supreme Court of Illinois a notice of appeal to the Supreme Court of the United States. Rec. 15-18.

This appeal is taken pursuant to Title 28 of the United States Code, Section 1257(2).

Validity of Statute Involved.

There is herein involved Sections 1 and 52 of "An Act to revise the law in relation to incompetents, idiots, lunatics, drunkards and spendthrifts" which was in existence in 1938. Said Sections of the statute (Illinois Revised Statutes, 1937, Chapter 86, Sections 1 and 53) read as follows:

"Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: When any person having any estate, real or personal, shall be, or be supposed to be, an insane person, who, by reason of unsoundness of mind, is incapable of managing and caring for his own estate, or when any person having any estate shall be, or be supposed to be a drunkard or spendthrift or otherwise incompetent, as defined in this Act the County Court of the county wherein such person resides, or if such person resides out of this State and has an estate within this State, then, the County Court of the county where his real estate or a part thereof may lie, or if such non-resident has no real estate in this State then the County Court of the county where he may have personal property, shall, on the proper petition of any reputable citizen of such county, for the appointment of a conservator of the person or estate (or both) of such person, proceed in the manner hereinafter provided, to ascertain whether such person be an insane person, who, by reason of unsoundness of mind, is incapable of managing and caring for his own estate, a drunkard, spendthrift or incompetent as aforesaid: Provided, that in any county wherein a Probate Court is or hereafter may be established, such application shall be made to said Probate Court."

"Section 52. The words "insane person," as used in this Act, shall include every idiot, non compos, lunatic, feeble minded, distracted or mentally incompetent person. The words "spendthrift," as used in this Act shall include every person, who, on account of excessive drinking, excessive use of drugs, gaming, idleness or debauchery, is incapable of managing and caring for his estate or so spends, wastes or lessens his estate as to expose himself or his family to want or suffering. *The word "incompetent", as used in this Act, shall include every person who by reason of any mental or physical incapacity or incompetency is incapable of managing and caring for his estate.*

> The word "drunkard," as used in this Act, shall include every person, who, on account of excessive drinking of intoxicants is incapable of managing and caring for his estate, or so spends, wastes or lessens his estate, so as to expose himself or his family to want or suffering." (Italics supplied).

The validity of the italicized sentence is to be determined by this Court.

Question Presented.

Is the statutory provision of the State of Illinois that a conservator may be appointed for any person who by reason of any "physical incapacity or incompetency is incapable of managing and caring for his estate" unconstitutional, being in violation of "due process of law," as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States?

Statement.

On March 5, 1938, a petition was filed in the Probate Court of Cook County, Illinois, by one Annabelle G. Hansen, praying that a conservator be appointed for the estate of Gertrude Macdonald and alleging:

> "That said Gertrude Macdonald is an incompetent person and wholly incapable of managing said estate or transacting business incident to the management, control and operation of certain properties to which she may be or become entitled." Rec. 3 (1-2).

On the date the petition was filed Gertrude Macdonald was served with a summons Rec. 3 (3).

No appearance or answer was filed by or on behalf of the said Gertrude Macdonald in the Probate Court of Cook County and as the record shows the judgment was entered by default— (Rec. (3))

On March 9, 1938, four days after the petition was filed, the following verdict, signed by six jurors, was rendered:

> "We the undersigned Jurors in the case of Gertrude Macdonald, alleged to be an incompetent person, having heard the evidence in the case, find from such evidence that the said Gertrude Macdonald is an incompetent person, that she is a resident of Cook County, and is incapable of managing and controlling her estate; that she is aged about 30 years." Rec. 3 (4).

On the same day, March 9, 1938, an entry was made by the Probate Court of Cook County "Judgment on the verdict." Rec. 3 (4).

The petition praying for the appointment of a conservator did not allege and the verdict of the jury and judgment of the Probate Court of Cook County thereon did not find that Gertrude Macdonald was either an idiot, lunatic, insane, or distracted person, or a person whose mind was impaired by the habitual use of intoxicating liquors. Rec. 3 (7).

On March 9, 1938, the Probate Court of Cook County appointed the Metropolitan Trust Company as conservator of the estate of Gertrude Macdonald. Rec 3 (7). On October 26, 1938, James Macdonald was appointed as successor conservator. Rec. 3 (4) and on September 15, 1951, James Macdonald was removed and the LaSalle National Bank was appointed as successor conservator. Rec. 3 (5).

The petition of Gertrude Macdonald, filed May 13, 1955, states that the petition of Annabelle G. Hansen, filed on March 5, 1938, praying for the appointment of a conservator for the estate of Gertrude Macdonald did not allege and the verdict of the jury and judgment of the Probate Court of Cook County thereon did not find that Gertrude Macdonald was either an idiot, lunatic, insane, or distracted person, or a person whose mind was im-

paired by the habitual use of intoxicating liquor Rec. 3 (7); that the petition of Annabelle G. Hantsen merely alleged and the jury merely found that Gertrude Macdonald was an incompetent person incapable to manage her estate Rec. 3 (5-6); and that the statute which provides that a conservator may be appointed for any person who by reason of any "physical incapacity or incompetency is incapable of managing or caring for his estate "is unconstitutional, being in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America. Rec. 3 (10-11).

The Amended Petition of Gertrude Macdonald, which was filed in the Probate Court of Cook County, among other things alleged, Rec. 3 (10-11):

> "Because of the provisions of Section 20 of Article 6 of the Illinois Constitution of 1870 and by virtue of Section 2 of Article 2 of the Illinois Constitution of 1870 and Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, the Probate Court of Cook County did not have jurisdiction to appoint a conservator of the person or estate of Gertrude Macdonald, and the appointments by the Probate Court of Cook County of conservators were and are void *ab initio*, and all of the acts and doings of the said appointed conservators are null and void, for the following reasons:
>
> * * * * *
>
> (d) No conservator may therefore be appointed by the Probate Court of Cook County unless there is an allegation and a finding that the person for whom a conservator is to be appointed is an idiot, lunatic, insane, or distracted person, or a person whose mind is impaired by the habitual use of intoxicating liquors.
>
> (e) Since there was neither alleged nor found that Gertrude Macdonald was an idiot, lunatic, insane, or distracted person, or a person whose mind was impaired by the habitual use of intoxicating liquors, the

Probate Court of Cook County did not at any time have jurisdiction to appoint a conservator for Gertrude Macdonald.

(f) In the year 1919, the Illinois Legislature, for the first time in the history of Illinois, provided by statute that a conservator may be appointed for any person who by reason of any "physical incapacity or incompetency is incapable of managing and caring for his estate." This statutory provision is contrary to Section 2 of Article 2 of the Illinois Constitution of 1870 and Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, both of which guarantee that no person shall be deprived of life, liberty or property without due process of law. Because of the mere presence of a physical incapacity, the State of Illinois may not deprive a person of his right (1) to make contracts, (2) to act through agents of his own choice, and (3) to deal with his property as he may see fit, and the State of Illinois may not place the property of a physically incapacitated person under the control of a conservator who is appointed without the consent of the property owner and who may deal and dispose of the property without consulting the property owner."

This Circuit Court of Cook County, Illinois, dismissed and denied the petition of Gertrude Macdonald and expressly ruled, Rec. 3 (23), that "None of the statutes complained of in the amended petition of Gertrude Macdonald, filed in the Probate Court May 13, 1955, violate any of the provisions of the Constitution of the State of Illinois nor of the Constitution of the United States." The Supreme Court of Illinois affirmed the judgment of the Circuit Court of Cook County, Illinois. Rec. 8.

The opinion of the Supreme Court of Illinois states that Gertrude Macdonald "lived fourteen years in an institution for the feeble minded", Rec. 6, but fails to state that "her stay there was voluntary as a part time employe and

not under commitment of any court or under the care and treatment of the welfare department of the State of Illinois." Rec. 13.

The Federal Question is Substantial.

The Illinois statutory provision that a conservator may be appointed for any person who by reason of any "physical incapacity or incompetency is incapable of managing and caring for his estate" is unconstitutional, being in violation of "due process of law" as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Illinois, in its opinion Rec. 8 assumed that the Probate Court of Cook County, Illinois in 1938 declared Gertrude Macdonald to be incapable of caring for and managing her estate because, (1) "both of the trial judges who saw her in 1955 and 1956 expressed doubt as to her mental ability to handle her affairs," (2) "she lived fourteen years in an institution for the feeble-minded," (3) "nowhere in the record was it suggested that she had any physical disability." (See Petition for Rehearing Rec. 12-13.)

The Probate Court of Illinois had no jurisdiction to adjudge Gertrude Macdonald an incompetent person because of mental illness in order to appoint a conservator for her estate unless she had *first* been deprived of her civil liberties as a result of a finding of mental illness by a county court of Illinois under the provisions of the Mental Health Act, Chap. 91½ of the Illinois Revised Statutes, or unless she had been declared mentally ill by a foreign court of competent jurisdiction. (See petition for Rehearing Rec. 12-13)

In the year 1919, the Illinois Legislature, for the first time in the history of Illinois, provided by statute that a

conservator may be appointed for any person who by reason of any "physical incapacity or incompetency is incapable of managing and caring for his estate" Rec. 3(11), which terminology and description is wholly outside the definition of mental illness which renders a person incapable of managing and caring for his own estate under the Mental Health Act, Chap. 91½ Sec. 8 of Art. I of the Illinois Revised Statutes.

By mandate of Section 20 of Article VI. of the Constitution of the State of Illinois which limits the jurisdiction of the Probate Courts to the appointment of conservators and the settlement of their accounts and by virtue of Section 18 of Article VI. of the State Constitution which grants to the county courts other jurisdiction which may be provided by general law, the county courts and *not* the probate courts have original and exclusive jurisdiction over the subject matter of depriving persons, not charged with crime, of their liberty on the grounds of mental illness. Chap. 91½ of the Illinois Revised Statutes, designated as the Mental Health Code, entitled,

> "AN ACT to revise the law in relation to the commitment, admission, detention, care and treatment of mentally ill persons, mentally deficient persons and persons in need of mental treatment; to provide for the licensing and regulation of private institutions for the care of mentally ill persons, mentally deficient persons and persons in need of mental treatment; and to repeal certain Acts therein named."

Provides that,

> Art. I. Section 1-8. "Mentally Ill Person", when used in this Act, means any person afflicted with mental disease to such an extent that for his own welfare, or the welfare of others or of the community, he requires care, treatment, detention and training, and which renders him *incapable of caring for and managing his own estate;* provided that, except as is other-

wise provided with respect to persons under the control of the Youth Commission, nothing in this Act shall be construed to apply to any mentally ill persons, or person supposed to be mentally ill, who is in custody on a criminal charge. (As amended by act approved June 30, 1953)

Art. II Section 2-2. "Jurisdiction over the persons of mentally ill persons and persons in need of mental treatment, not charged with crime, is hereby vested in the County Courts of the several counties of the State."

Art. III Sec. 3. No person shall be deprived of his liberty on the grounds that he is, or is supposed to be, mentally ill, mentally deficient, or in need of mental treatment, except in accordance with the provisions of this Act.

Art. V. Court commitment.
Art. VI. Emergency Admission—Detention.
Art. VII. Restoration—Discharge—Habeas Corpus
Art. IX. Maintenance and Treatment, etc.
Art. XII. Penalties.
Art. XV. Repeal.
Art. XVI. Saving Clause.

In view of the above law, Gertrude Macdonald, therefore, was confined to the proposition that she had been declared an incompetent and incapable of caring for and managing her estate by the Probate Court of Cook County, on the grounds of "physical incapacity" in pursuance of the Statute, Sections 1-53 of Chapter 86 which authorizes the Probate Court to appoint a conservator for such a person.

Physical incompetency is constitutionally not sufficient for the appointment of a conservator.

In *Schaefer* v. *Haller*, 108 Ohio State 322, involving the constitutionality of the Ohio Statute which provides that a person may be declared an incompetent either for mental or physical deficiencies, the lower court found "*the*

plaintiff in error to be competent mentally, but physically incompetent, to care for his property." The Supreme Court of Ohio held the statute unconstitutional, and said beginning at page 325:

"Section 10989 reads, in part:

'Upon satisfactory proof that a person resident of the county, or having legal settlement in any township thereof, is an idiot or imbecile, or lunatic, or an incompetent by reason of advanced age or mental or physical disability or infirmity, the probate court shall appoint a guardian for such person.'

In the discharge of its obligation to so interpret each enactment of the Legislature as to make it conform to the provisions of the Constitution of the state and federal government, this court has endeavored to construe Section 10989, General Code, so as to qualify the word "incompetent" by the word "mentally"; but by reason of the fact that the Legislature has made its own classification of persons subject to guardianship under this provision, and, in addition to idiots, imbeciles, and lunatics, has made a general classification under the comprehensive term "incompetent", and has furnished its own definition of the word "incompetent", by declaring such to be a person "incompetent by reason of advanced age," "incompetent by reason of * * mental * * * disability or infirmity," "incompetent by reason of * * * physical disability or infirmity," and has distinguished between mental incompetency and physical incompetency, and made each a ground for the appointment of a guardian, this court cannot by any process, other than by an arbitrary disregard of the language of the section itself, arrive at the conclusion that the Legislature did not intend to make a person suffering from a physical disability alone an incompetent within the provisions of this section. The majority of the court being of that opinion, the court is confronted with the second question propounded above.

"The practice of the state exercising a paternal supervision over the property of persons mentally in-

competent to exercise such supervision for themselves has existed in some form or other since the foundation of government among men. Without going into a history of the various forms of guardianship which have prevailed in the various jurisdictions of the world, it is sufficient to say that, in so far as we have been able to discover, the guardianship of property has always and everywhere been confined to the guardianship of the property of persons mentally incapable of managing such property—incapable either by reason of infancy or by reason of lack or impairment of intellect; the theory being that the acquisition of property constitutes an act of the will, that a person acquires property either by the exercise of his own will to dominate exclusively an animate or inanimate object, which is under the domination of no person, and thereby subjects such object to his will, and therefore makes such object his property, or, by the exercise of his will in conjunction with the exercise of the will of the person who already dominates such object, receives a transfer of such domination from the person who theretofore exercised such domination, and that where a person either by reason of his infancy has not attained the power to exercise his will or by reason of a defect from birth never has and never can have the will to exercise, or by reason of accident or disease has lost the power to exercise his will, the state, in the exercise of its sovereignty, supplies to such through the medium of a guardian the mental attribute which such person has not yet attained, will never have, or has for the time being lost.

"Blackstone has described property as the 'sole and despotic domination which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.' (Blackstone's Commentaries, book 2, ch. 1, p. 2.) While this definition, in the light of present-day situations, would necessarily have to be rather liberally construed, it states the essential characteristic of property. Woerner in his American Law of Administration (2d Ed.), Section 1, states:

'My property is that which is mine. That only is mine which I acquire, hold, and dispose of by my will. It is my will which determines the acquisition of a thing by me, whether originally, by reducing to possession, and thus making my property that which was no one's property before, or by contract, by which a thing becomes mine through the concurrence of my will with that of its former owner.''

And in Section 4 he states:

'Property, then, is the realization of the free will of a person, the external sphere of his freedom. As such, it partakes of, and is clothed with, the dignity and inviolability of the person. The things which constitute property can have no rights, for they have no will; and will alone, or the person in which it has its abode and vehicle, can be the subject of right and of its correlative, duty. The law recognizes and deals with property only in so far as it recognizes and deals with the will of the owner, realized or externalized therein.'

In Section 3 he states:

'Alienability is of the essence of property; an infringement of my right or power to alienate my property is therefore a limitation upon my free will, and to that extent a violation of my personal liberty, because my free will finds realization in property. The infraction of my personal freedom is precisely the same if a limitation is put upon my power to alienate property as if I were prevented from acquiring, or from holding or using it. The limitation would in either case deprive me of my power to contract, and thus destroy my liberty.'

''It thus follows that the function of the state in exercising a guardianship over the property of one of its defective subjects, whether defective by reason of age, birth, accident, or disease, arises out of the fact that such defective is lacking in the power to exercise his will, which we have come to term ''mental capacity to manage,'' and not out of lack of physical ability to care for, control, develop, and utilize.

"The existence of the power to exercise the will, the mental capacity to manage, implies the ability to employ or secure some one physically able to perform the tasks set, and if the power to exercise the will, the mental capacity to manage exists, that function can be performed as well by a person physically incapacitated as by a guardian, for it is not contemplated by Section 10989, General Code, that the guardian shall perform the physical labor necessary for the utilization and enjoyment of the property, but that out of the proceeds of the estate of the ward such physical labor shall be employed; and, since a ward "competent mentally, but physically incompetent," possesses the mental capacity to manage, and therefore the mental capacity to employ or secure some one possessing physical capacity to carry out his will, all reason for the substitution for his mental capacity to manage of the mental capacity of a guardian to manage disappears.

"Section 1, Article I, of the Constitution of Ohio, guarantees to all persons within its borders:

'Certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property.'

"There being no sound reason for the provision of Section 10989, General Code, that makes physical disability or infirmity a ground for the appointment of a guardian of the property of a person mentally competent, but physically incompetent, the provision is an unwarranted abridgment of the liberty of such person, and an unwarranted abridgment of his right to acquire, possess and protect property, and therefore in violation of Section 1, Article I, of the Constitution."

It is respectfully submitted that the decision of the Supreme Court of Ohio is sound and does apply to the instant case and that this Honorable Court ought to follow that decision in its interpretation of "due process of law" under the Federal Constitution.

If the decision of the Supreme Court of Illinois is allowed to stand, then there is no standard as to who shall and who shall not be adjudged an incompetent and every citizen is in jeopardy of being declared an incompetent even though he or she is not an insane or mentally ill person. (See Petition for Rehearing in Supreme Court of Illinois Rec. 12-13, 3(11)).

Further, Gertrude Macdonald respectfully submits that if the Supreme Court of Illinois has decided that she was legally adjudged mentally ill, by a proceeding in the Probate Court of Cook County, Illinois, that the judiciary is exercising a legislative function in violation of the State Constitution, Article III. *Distribution of Powers* and therefore has been deprived of her liberty under a void judgment in violation of the due process clause of the fourteenth amendment to the Constitution of the United States.

In this connection it should be noted that Gertrude Macdonald was not and could not be served with a warrant to enforce her presence in the Probate Court of Cook County at the time she was adjudged incompetent and that the record is silent as to any medical findings of fact from which to establish or substantiate "mental" incompetency. (See Petition for Rehearing before the Supreme Court of Illinois Rec. 12-13, Rec. 3 (3)).

Therefore, the question remains,—without evidence of a finding of "mental" incompetency rendering a person incapable of managing and caring for his own estate, by the County Court of Cook County under the provisions of the Mental Health Code or by a court of competent jurisdiction of a foreign state—can a citizen be deprived of his civil liberties because of a mere "physical disability" of which all citizens are possessed in one way or another, if not by loss of sight, an arm or a leg—then by weakening of the organic processes?

Can such deprivation as set forth in the instant case be tolerated or considered under our Constitutional form of government, as not being in violation of fundamental rights as guaranteed under the due process clause of the fourteenth amendment to the Constitution of the United States?

CONCLUSION.

It is respectfully submitted that this Honorable Court should take jurisdiction of this appeal, since Gertrude Macdonald was deprived of her liberty contrary to "due process of law" as guaranteed to her by the Fourteenth Amendment to the Constitution of the United States and the federal question herein involved is substantial.

Respectfully submitted,

GERTRUDE MACDONALD, *pro se*

OPINION OF SUPREME COURT OF ILLINOIS.

Gertrude Macdonald, Appellant, vs. LaSalle National Bank, Conservator, et al., Appellees.

Mr. Justice Hershey delivered the opinion of the court:

After a jury trial in the probate court of Cook County, Gertrude Macdonald was found to be an "incompetent person," "incapable of managing and controlling her estate," and the court appointed a conservator for her, letters of conservatorship being issued on March 30, 1938, to the Metropolitan Trust Company. Seventeen years later, on May 13, 1955, she filed a petition in the same court, alleging that the court lacked jurisdiction to enter the previous order and asking that it be vacated and the successor conservator, La Salle National Bank, be discharged. The petitioner's position was that the statute under which the court purported to act was unconstitutional

The probate court dismissed the petition. On appeal to the circuit court, the petition was again dismissed. The appeal comes directly to this court on the theory that a constitutional question is involved.

That part of the general statute relating to the appointment of conservators to which the petitioner directs her attack reads as follows: "The word 'incompetent', as used in this Act, shall include every person who by reason of any mental or physical incapacity or incompetency is incapable of managing and caring for his estate." (Ill. Rev. Stat., 1937, chap. 86, par. 53.) She asserts that this provision authorizes the appointment of a conservator for one who is only "physically" incompetent, and is therefore violative of the due process clauses of the Federal and Illinois constitutions.

In our opinion, the petitioner is not entitled to prevail, because (1) there is nothing to show that the probate court interpreted or applied the statute in the manner alleged, and (2) the statute, properly construed, is constitutionally valid.

First, the record shows strict compliance with the statutory requirements regarding the initial petition, the issuance and service of summons, and jury trial. Moreover, there is nothing to demonstrate that the incompetence of the petitioner was or is "physical." Indeed, the contrary is indicated. For she was found by the jury in 1938 to be "incapable of managing and controlling her estate," she lived fourteen years in an institution for the feeble minded, and both of the trial judges (who saw her in 1955 and 1956) expressed doubt as to her present mental ability to handle her own affairs. Nowhere in the record is it suggested that she has any physical disability.

Failing to show that the court undertook to adjudge her incompetent because of a physical incapacity, she fails to show wherein the alleged statutory defect adversely affected her.

Second, the provision, properly construed, is constitutionally valid.

The test which is universally applied in determining judicially whether a conservator should be appointed is whether the person is capable of managing his own affairs. (See *e.g.; Snyder* v. *Snyder,* 142 Ill. 60; *Kutzner* v. *Meyers,* 182 Ind. 669; *In re Coburn,* 162 Cal. 202; *In re Thoreson's Guardianship,* 72 N. Dak. 101, 4 N. W. 2d 822; *Appeal of Hogan,* 135 Maine 249; 194 Atl. 854; *Appeal of Wente,* 76 Conn. 405, 56 Atl. 625; *Shapter* v. *Pillar,* 28 Colo. 209, 63 Pac. 302; *In re Barker,* (N. Y.) 2 Johns Ch. 232;

Calderon v. *Martin*, 50 La. Ann. 1153, 23 So. 909). The statute under consideration adopts this test also, since it provides expressly that before "mental or physical incapacity or incompetency" is sufficient to permit the appointment of a conservator it must render the person "incapable of managing and caring for his estate."

Courts have traditionally intervened, either on the basis of inherent judicial authority or pursuant to statutory authorization, to protect those unable to protect themselves; *i.e.*, those who are incapable of caring for themselves or managing their own affairs. (ee, *e.g.*, 25 Am. Jur., Guard and Ward, sec. 23; 28 Am. Jur., Insane and other incompetent Persons, sec. 25). In recognition of this, the Illinois constitution authorizes the legislature to establish probate courts having "original jurisdiction of * * * the appointment of guardians and conservators," (art. VI, sec. 20); and the Illinois legislature has provided for such courts. Moreover, the legislature has from time to time established various procedures, incorporating in some form the test discussed above, to guide probate courts in the exercise of this necessary judicial function. The validity of statutes of this type has repeatedly been upheld against constitutional objections.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

Judgment Affirmed.

Judgment of Supreme Court of Illinois.

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Cook County aforesaid, Be Affirmed In All Things And Stand In Full Force And Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellees recover of and from the said appellant costs by them in this behalf expended, to be taxed, and that they have execution therefor.

Supreme Court, U.S.
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LA SALLE NATIONAL BANK, Conservator

Appeal from the Supreme Court of Illinois

Answer to Motion to Dismiss or Affirm

GERTRUDE MACDONALD, pro se
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Answer to Motion to Dismiss or Affirm

Now comes Gertrude Macdonald, appellant, in answer to the Motion to Dismiss or Affirm and says,

1. The La Salle National Bank, either individually or as conservator, is prohibited by State and Federal laws from using either bank funds or appellant's funds to oppose the appellant's personal interest in the case at bar and, in so doing, is acting beyond the scope of it's authority.

2. The La Salle National Bank cannot properly interject itself in a suit upon a cause of action in which it has no interest.

The appellant is seeking relief from a judgment of the Supreme Court of Illinois affirming the order of the Circuit Court of Cook County, Illinois which found her to be an incompetent person and incapable of managing and caring for her estate for mental reasons. (Jurisdictional Statement, on page 17).

The La Salle National Bank can present no law or doctrine under which it can claim a right to oppose the appellant's contention that this judgment illegally restrains her of her liberty, when such restraint is in violation of the Constitution of the United States.

STATEMENT.

On October 29, 1957, certified and exemplified documents were filed in this case from the Probate Court of Cook County, Illinois, and affidavits, etc. which for convenience, will be described and numbered as follows:

EXHIBIT I. Motion of Gertrude Macdonald, to Dismiss the Petition of the La Salle National Bank to Oppose Appellant in the Probate Court because of possible "De Son Tort" Liability to the bank, individually.

EXHIBIT II. "Petition to Vacate and Set Aside Appointments of Conservators of the Person and Estate of Gertrude Macdonald, which Appointments Were Made Without Service of Process on Gertrude Macdonald, Without Giving Her an Opportunity to Be Heard, and Through the Perpetration of a Fraud Upon Gertrude Macdonald and Upon the Probate Court of Cook County, Illinois." (July 12, 1955).

EXHIBIT III. Order entered by the Probate Court on September 13, 1955, continuing the above-captioned petition generally and without date.

EXHIBIT IV. An AFFIDAVIT procured from Annabelle G. Hansen, which evidence substantiates the fraud perpetuated on appellant, as fully described and set forth in Exhibit II.

EXHIBIT V. Evidence showing attempts made to have the Annabelle G. Hansen AFFIDAVIT entered of record.

Because of the above exhibits being recently filed in this case at bar, new issues have been raised which the appellant believes will shed new light on the matter before this Court.

A Brief History Of Appellant's Case Follows In Narrative Form So That The Context Will Not Be Lost.

1. The appellant never knew she was deprived of her liberty on March 8, 1938 by the Probate Court of Cook County until long after her appeal time was gone and a conservator had been appointed for her estate, said judgment being final and conclusive, thereby putting her in the class of the "legally dead." (*Bradshaw* v. *Lucas*, 214 Ill. App. 218).

2. An inspection of the record showed the following:

a). The petition showed that an Annabelle G. Hansen had prosecuted a Gertrude Macdonald for incompetency as being incapable of managing and caring for her estate, without giving an address or description for the said Gertrude Macdonald. Rec. 3 (1-2).

b). On the same day summons was served on a Gertrude Macdonald, again without address, or description, as if a person would appear at the "window" of the Sheriff's office and say, "Do you have a summons to serve on me today for an incompetency proceeding?" Rec. 3 (3).

c). Three days later a jury sat and found a Gertrude McDonald, a resident of Cook County, incompetent and incapable of managing and caring for her estate. A corporate conservator was then appointed by the court. Rec. 3 (3).

3. Endless hours and thousands of dollars were spent by appellant's family to have the judgment set aside, but counsel set forth the difficulty the record presented:

a). The appellant's word now meant nothing towards setting up the truth, because of her incompetency.

b). There could not have been a jury trial without an appearance, so that if appellant could not produce the person who appeared in her place and stead, she could not collaterally attack the finding of the jury, and that such appearance cured the lack of address or description in the initial petition and summons.

4. In 1955, three events occurred which gave appellant hope for an immediate release from the illegal restraint of her liberty. They were,

First, Jean Macdonald, sister-in-law to the appellant, found the stranger who had prosecuted appellant for incompetency, one Annabelle G. Hansen who admitted all the statements as now set forth in her sworn AFFIDAVIT (Exhibit IV.) but refused to sign an AFFIDAVI fearing a possible prosecution for fraud, but welcomed an opportunity to clear her conscience if subpoened into the Probate Court, thereby resulting in the preparation of Exhibit II. Soon thereafter, appellant found counsel willing to represent her in the Probate Court, thereby resulting in the preparation of two separate petitions, one on the Law (now before this Court) and the other on the facts setting forth the fraud (Exhibit II).

Second, after all the years of "darkness", and the stigma of the proceedings against appellant, she believed soon would be eradicated *ab ihitio*. (Instead of the corporate conservator, the La Salle National Bank, insisting on such a hearing (Exhibit II.), the appellant was instead opposed by said bank and finally an order was entered continuing

the matter generally and without date (Exhibit III.) The question of Law was heard on the Amended Petition of appellant in the Probate Court and an order was entered denying and dismissing said petition. Rec. 3(15).

Third, counsel in preparing the transcript of record for an appeal, on a trial *de novo* to the Circuit Court, found a number on the service of summons (15780) which bore no relationship to the Probate File. Tracking the number down, counsel found in the warehouse files of the probate court a volume in which entries were made setting forth, among other things, "This day came the said petition by her attorney and this cause now coming on to be heard and the said Gertrude McDonald, being solemnly called in open court came not nor any one for him." Rec. 3(3) Here, for the first time in seventeen years was the proof that appellant had not appeared before a jury, but soon appellant learned that there was no way for appearances to be forced before the court because the statute did not provide for a warrant to issue and that most judgments against the people in incompetency proceedings, depriving persons of their liberty, were by default. (*Procedure for the appointment of a conservator*, used for inquisitions into lunacy, is fully set forth on page 10, La Salle National Bank's Brief).

Instant Case At Bar.

The appellant was barred from raising questions of fact, those questions having become separated when the Probate Court did not hear the petition for fraud, but continued the matter generally and without date. (Exhibits II, III.).

Had said petition been heard, the appellant undoubtedly would not be before the court now.

The appellant cannot understand the La Salle National Bank's reason, in light of it's knowledge of the above history of the case, to have emphasized that, "The statute complained of * * * clearly provided appellant with notice and an opportunity to be heard" (page 2 of Motion) and again (on page 11 of its brief), "The record shows that appellant was duly served with summons and the issues were tried by jury. Appellant does not contend otherwise, and the Supreme Court of Illinois so found in the decision appealed from."

The use of such a procedure to deprive appellant of her liberty, *i.e.* Chapter 86, Sections 1, 2, and 53 and its continued use today under Sections 113 (c)-117 of Chapter 3 of the Illinois Revised Statutes did result in the final showing of a terrible fraud against appellant, but what can be said for those persons deprived of their liberty by the use of the same procedure who have not had a family to help them out? Can we be sure that their presumption of sanity was carefully safeguarded, in its destruction when the statute complained of provides for no medical examination, no warrant to enforce their appearance at their own trial, no protection to the public or to themselves as to their health, safety and welfare by the Public Welfare Department?

The appellant deeply believes that basic fundamental rights belonging to all citizens are being violated, but hesitates, in appearing before this court, *pro se*, to enlarge the federal question but will leave it to this court to decide.

If it please the Court to take Judicial Notice of the fact that since June 21, 1893 the authority to commit mentally ill persons to private institutions has been confined to the

county courts exclusively under the strict, constitutionally safeguarded provisions of Chapter 85, since repealed and now under like provisions of Chapter 91½ of the Illinois Revised Statutes (on pages 9 and 10 of Jurisdictional Statement).

On Thursday, August 16, 1956 and subsequently there appeared in the Chicago Daily Law Bulletin the following Announcement by the Probate Court of Cook County, Illinois:

> "ATTENTION ALL ATTORNEYS
>
> *In re*: Petition for appointment of conservator *wherein no prior adjudication has been had in the County Court of Cook County, or in any other court of competent jurisdiction*
>
> The clerk of the Probate court of Cook County has for the use of attorneys a form of 'Physicians Affidavit' required under section 113(c) of the Probate act, *to be used where no prior adjudication has been had* The affidavit shall contain the mental and physical findings of the physician and shall be sworn to before a notary public or any other duly authorized officer authorized to administer oaths.
>
> This affidavit shall be fully executed and filed with the petition on the date of hearing thereon in open court."

Nowhere, under Section 113(c) or in any other part of Art. X entitled, "Conservators" of Chapter 3 of the Illinois Revised Statutes referred to in the above announcement, did the Illinois General Assembly make any provision requiring the use of a Physician's Affidavit for any purpose whatsoever in the Probate court of Cook County, Illinois, and the "Physician's Affidavit" provides for commitment to a private institution.

CONCLUSION.

It is respectfully submitted that the Motion of the La Salle National Bank be denied and that this Honorable Court should take jurisdiction of this appeal for the reasons stated above, since Gertrude Macdonald was deprived of her liberty contrary to "due process of law" as guaranteed to her by the Fourteenth Amendment to the Constitution of the United States and the federal question herein involved is substantial.

Respectfully submitted,

GERTRUDE MACDONALD, *Pro se.*

State of Illinois }
County of Cook } ss.

Gertrude Macdonald, being duly sworn, deposeth and says that the foregoing Facts and Statements by her subscribed, are true to her best knowledge and belief.

.....

1462 Ridge Avenue, Evanston, Illinois

Subscribed and Sworn to before me,
this ..... day of November, A.D., 1957

.....

Notary Public

My commission expires .....

FILED
OCT 21 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 504

GERTRUDE MACDONALD,
Appellant,

vs.

LA SALLE NATIONAL BANK, CONSERVATOR,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION OF APPELLEE TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

JOHN R. NICHOLSON,
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135 S. La Salle Street,
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Attorneys for Appellee.

Of Counsel:
NICHOLSON, NISEN & ELLIOTT.

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IN THE

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No. 504.

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vs.

LA SALLE NATIONAL BANK, CONSERVATOR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS OR AFFIRM.

Now comes the appellee, La Salle National Bank, by John R. Nicholson and Charles M. Nisen, its attorneys, pursuant to Rule 16 of the Rules of this Court, and moves (1) to dismiss the appeal from the judgment of the Supreme Court of Illinois entered March 20, 1957 in the case entitled *Gertrude Macdonald, Appellant* v. *La Salle National Bank, Conservator, et al., Appellees,* or (2), in the alternative, to affirm said judgment.

As grounds for such motion appellee states:

(a) The judgment of the Supreme Court of Illinois rests on an adequate non-federal basis, namely, that appellant failed to show that she was originally adjudged an incompetent because of a physical incapacity and therefore failed

to show wherein the alleged statutory defect adversely affected her; and

(b) The "due process" question which appellant seeks to present by this appeal (Statement as to Jurisdiction, page 4) is not a substantial federal question for the reason that the statute complained of permitted a conservator of the estate to be appointed only for one found "incapable of managing and caring for his estate," and clearly provided appellant with notice and an opportunity to be heard.

JOHN R. NICHOLSON,
CHARLES M. NISEN,
Attorneys for Appellee.

Of Counsel:
NICHOLSON, NISEN & ELLIOTT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 504.

GERTRUDE MACDONALD,

Appellant,

vs.

LA SALLE NATIONAL BANK, CONSERVATOR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

Appellee respectfully submits this brief in support of its motion to dismiss the appeal from, or in the alternative to affirm, the judgment of the Supreme Court of Illinois entered March 20, 1957, in the case entitled *Gertrude Macdonald, Appellant* v. *La Salle National Bank, Conservator, et al., Appellees*, reported at 11 Ill. (2d) 122.

The reasons advanced in support of that motion are argued in order.

ARGUMENT.

I.

The judgment of the Supreme Court of Illinois rests on an adequate non-federal basis, namely, that appellant failed to show that the Probate Court of Cook County originally undertook in 1938 to adjudge her incompetent because of a physical incapacity and therefore failed to show wherein the alleged statutory defect adversely affected her.

The decision of the Supreme Court of Illinois in the case at bar rests on two grounds, each of which is independent of the other. That Court said in its opinion (Statement as to Jurisdiction, page 18):

> "In our opinion, the petitioner is not entitled to prevail; because (1) there is nothing to show that the probate court interpreted or applied the statute in the manner alleged, and (2) the statute, properly construed, is constitutionally valid."

In completing its discussion of the first reason for affirmance, the Supreme Court of Illinois said (Statement as to Jurisdiction, page 18):

> "Failing to show that the court undertook to adjudge her incompetent because of a physical incapacity, she fails to show wherein the alleged statutory defect adversely affected her."

This Court has likewise repeatedly held that one seeking to attack a statute as unconstitutional must first demonstrate that the alleged unconstitutional portion of the statute was applied to him.

Thus, in *Mallinckrodt Chemical Works* v. *St. Louis*, 238 U. S. 41, this Court said (at page 54):

> "As has been often pointed out, one who seeks to set aside a state statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him."

See also, *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544, and cases cited, and *Gorieb* v. *Fox*, 274 U. S. 603, 606.

Appellant seeks to avoid this result by stating:

> "The opinion of the Supreme Court of Illinois states that Gertrude Macdonald 'lived fourteen years in an institution for the feeble minded', Rec. 6, but fails to state that 'her stay there was voluntary as a part time employe and not under commitment of any court or under the care and treatment of the welfare department of the State of Illinois.' Rec. 13." (Statement as to Jurisdiction, pp. 7, 8.)
>
> * * * * *
>
> "the record is silent as to any medical findings of fact from which to establish or substantiate 'mental' incompetency." (Statement as to Jurisdiction, p. 15.)

The statement at Rec. 13 is from appellant's unsworn Petition for Rehearing. Nowhere in the record is there any suggestion that evidence was presented in the lower court to show that her fourteen-year stay in a home for the feeble-minded was "as a part time employe." Nor does her Amended Petition filed May 13, 1955, upon which her present action is based, contain any allegation that she was mentally competent when adjudged incompetent in 1938. (Rec. 3 (5-13).)

Appellant misplaces the burden of proof. As shown by the opinion of the Supreme Court of Illinois in this case, and contemplated by the rule stated in the *Mallinckrodt*

case, appellee does not have the burden of showing appellant was originally adjudged incompetent in 1938 for mental reasons. Rather, the burden was on appellant to show that such adjudication was based on physical incapacity. This she has not done.

The record clearly shows that a jury adjudged appellant an incompetent person only after it "heard the evidence adduced." Rec. 3 (3). The rule in Illinois is that the burden is on the one who makes a collateral attack, as in the instant case, to show that the "evidence adduced" did not justify the exercise of the court's jurisdiction. *Illinois Merchants Trust Co. v. Turner* (1930), 341 Ill. 101, 105, 106.

At pages 9-10 of her Statement as to Jurisdiction, appellant refers to the Mental Health Code, Chapter 91½ of the Illinois Revised Statutes. She quotes Article II, Sec. 2-2 of that Code (giving the county courts of Illinois jurisdiction over "the person of" mentally ill persons) and Article III, Sec. 3-1 (which states no person supposed to be mentally ill shall be deprived of his "liberty" except in accordance with that Act). From these provisions she apparently reasons that Illinois probate courts are deprived of jurisdiction to make an adjudication of incompetency for mental reasons and thus she must have been adjudicated for physical incapacity.

This contention not only is unsupported by Illinois law but also in no way avoids the fact that the decision of the Supreme Court of Illinois in the case at bar rests on an adequate non-federal basis.

First, the question of whether the Probate Court of Cook County had jurisdiction under the constitution and statutes of Illinois to adjudicate appellant an incompetent person for mental reasons is purely a state question, and was

decided in the affirmative by the decision of the Supreme Court of Illinois in the case at bar (Statement as to Jurisdiction, page 19).

Second, The Mental Health Code referred to by appellant (Chapter 91½, Ill. Rev. Stat., 1957), was not enacted until 1951. It deals with the commitment, detention, and care of mentally ill persons—not with the conservation of their estates.

Prior to adoption of the Mental Health Code, there had been other statutes in effect in Illinois which gave to the county courts the jurisdiction to determine the question of insanity in connection with the commitment and detention of insane persons.[1] Nevertheless, in cases involving only the appointment of conservators, the Supreme Court of Illinois has always recognized that the probate courts had inherent jurisdiction to determine the question of competency in connection with their "original jurisdiction of * * * the appointment of guardians and conservators" under Article VI, Section 20 of the Illinois Constitution of 1870 (Ill. Rev. Stat. 1937, p. 52) and the legislative act establishing probate courts in certain counties. (Ill. Rev. Stat. 1937, Ch. 37, Sec. 303.)[2] See *Snyder* v. *Snyder* (1892), 142 Ill. 60, 63-65; *Ure* v. *Ure* (1906), 223 Ill. 454, 465-466; and *Illinois Merchants Trust Co.* v. *Turner* (1930), 341 Ill. 101, 105-106.

1. The pertinent statute in effect during 1938 was "An Act to Revise the Law in Relation to the Commitment and Detention of Lunatics, and to Provide for the Appointment and Removal of Conservators, and to repeal certain acts therein named." Approved June 21, 1893. Laws of 1893, p. 140. (Ill. Rev. Stat. 1937, Ch. 85, Secs. 1-38.)

2. The provisions of Art. VI, Section 20 of the Illinois Constitution of 1870 and of the legislative act establishing probate courts in certain counties are printed in the Appendix to this Brief.

II.

The question of "due process" presented by appellant is not a substantial federal question.

Appellant challenges the definition of an "incompetent" in Section 52 of "An Act to revise the law in relation to incompetents, idiots, lunatics, drunkards and spendthrifts," Approved, March 26, 1874. (Ill. Rev. Stat., 1937, Ch. 86, Sec. 53.)

Section 52 of that Act is quoted at pages 3-4 of appellant's Statement as to Jurisdiction. For convenience we here repeat the statutory definition of an "incompetent" embraced in Section 52:

> "The word 'incompetent', as used in this Act, shall include every person who by reason of any mental or physical incapacity or incompetency is incapable of managing and caring for his estate."

The "due process" question presented by appellant is stated at page 4 of her Statement as to Jurisdiction.

In arguing that it is a substantial federal question she asserts (at page 10 of her Statement as to Jurisdiction), "Physical incompetency is constitutionally not sufficient for the appointment of a conservator," and relies on *Schaefer* v. *Haller*, 108 Ohio State 222.

That case is not applicable. The statute involved was held invalid under Section 1 of Article I of the Constitution of Ohio—not a "due process" clause.

More important, however, the Ohio statute involved (quoted at page 11 of the Statement as to Jurisdiction), authorized a guardian to be appointed for one suffering from a "physical disability or infirmity" *as such*. The Ohio statute did not contain the qualification found in the Illinois definition of an "incompetent" that the physical incapacity

must be such as to render one "incapable of managing and caring for his estate."

Appellant suggests (at page 15 of her Statement as to Jurisdiction) that such standard of judgment is "no standard". However, she cites no cases to show that incapacity to manage and care for one's estate is an inadequate standard.

The Supreme Court of Illinois in its decision in the case at bar (Statement as to Jurisdiction, pp. 18-19) has pointed to decisions in eight other states where a similar standard has been applied.[3] Obviously, people of normal mentality are subject to serious physical disabilities which, without affecting their mentality, may nevertheless for long periods of time render them incapable of carrying out or even communicating their desires respecting their property, *e. g.* a paralytic stroke. There is no reason why such persons should not enjoy the same paternal protection of their estates during such periods of incapacity that the state accords to the mentally ill.

This Court will not presume that the probate courts of Illinois will abuse the statutory standard or interpret it in a manner that would constitute a denial of due process of law. *Cf. Gorieb* v. *Fox*, 274 U. S. 603, 607.

In *Kutzner* v. *Meyers* (Ind. 1915), 108 N. E. 115, 116, the Supreme Court of Indiana had before it a statute providing for appointment of a guardian for the estate of any person found to be "incapable of managing his estate or business affairs because of old age * * *," and held that such statute constituted due process of law since it provided for notice and an opportunity for such issues to be tried before a legally constituted tribunal.

---

3. For a discussion of the adequacy of such standard in giving jury instructions, see *Snyder* v. *Snyder*, 142 Ill. 60 at pp. 66-70 (1892).

Section 2 of the Act of 1874 under which appellant was adjudicated (Ill. Rev. Stat. 1937, Ch. 86, Sec. 2) provided:

"2. *Procedure for appointment of conservator.*

Sec. 2. On any petition for the appointment of a conservator of any person being filed, the court shall set said cause for hearing, summons shall be issued returnable on any day fixed by the court and service thereof shall be had upon the person for whom a conservator is sought to be appointed, in the same manner by summons or otherwise as service is had in other civil cases, excepting that where personal service of such summons is had, such service shall be had at least three days before the return day of such summons. At the time fixed for the hearing, a jury of six persons (or at the request of either the petitioner or the respondent twelve persons), shall be empaneled to try the case, except that if a person has been adjudged insane or feeble-minded in the County Court, the person petitioning the Probate Court to appoint a conservator of such insane or feeble-minded person may file in the Probate Court a duly certified copy of the record of the said County Court in such proceeding, whereupon the Probate Court shall, without further inquest by a jury or commission of physicians, appoint a conservator. The court may for good cause continue the case from time to time. If any person be found to be an insane person, as defined in this Act, who by reason of such condition is incapable of managing or caring for his estate, or a drunkard, spendthrift or incompetent person, as defined by this Act, it shall be the duty of the court to appoint a conservator for such person or his estate or both: Provided no non-resident of this State shall be appointed under this Act as conservator. No petition filed under the provisions of this Act for the appointment of a conservator shall be dismissed or withdrawn without leave of the court in which such petition is filed.

"The trial shall proceed in the same manner as near as may be as trials at law in the Circuit Court except as otherwise provided in this Act. Upon the return of the finding of the jury the court shall cause the same

to be recorded at large by the clerk of the court, and unless the court shall grant a new trial, the court shall enter the proper order in accordance with the findings of the jury. Motions for a new trial in such causes may be made orally and when so made shall be entered upon the records. (As amended by act approved June 28, 1935. L. 1935, p. 953.)"

The record shows that appellant was duly served with summons and that the issues were tried by a jury. Rec. 3(3). Appellant does not contend otherwise, and the Supreme Court of Illinois so found in the decision appealed from. (Statement as to Jurisdiction, page 18.)

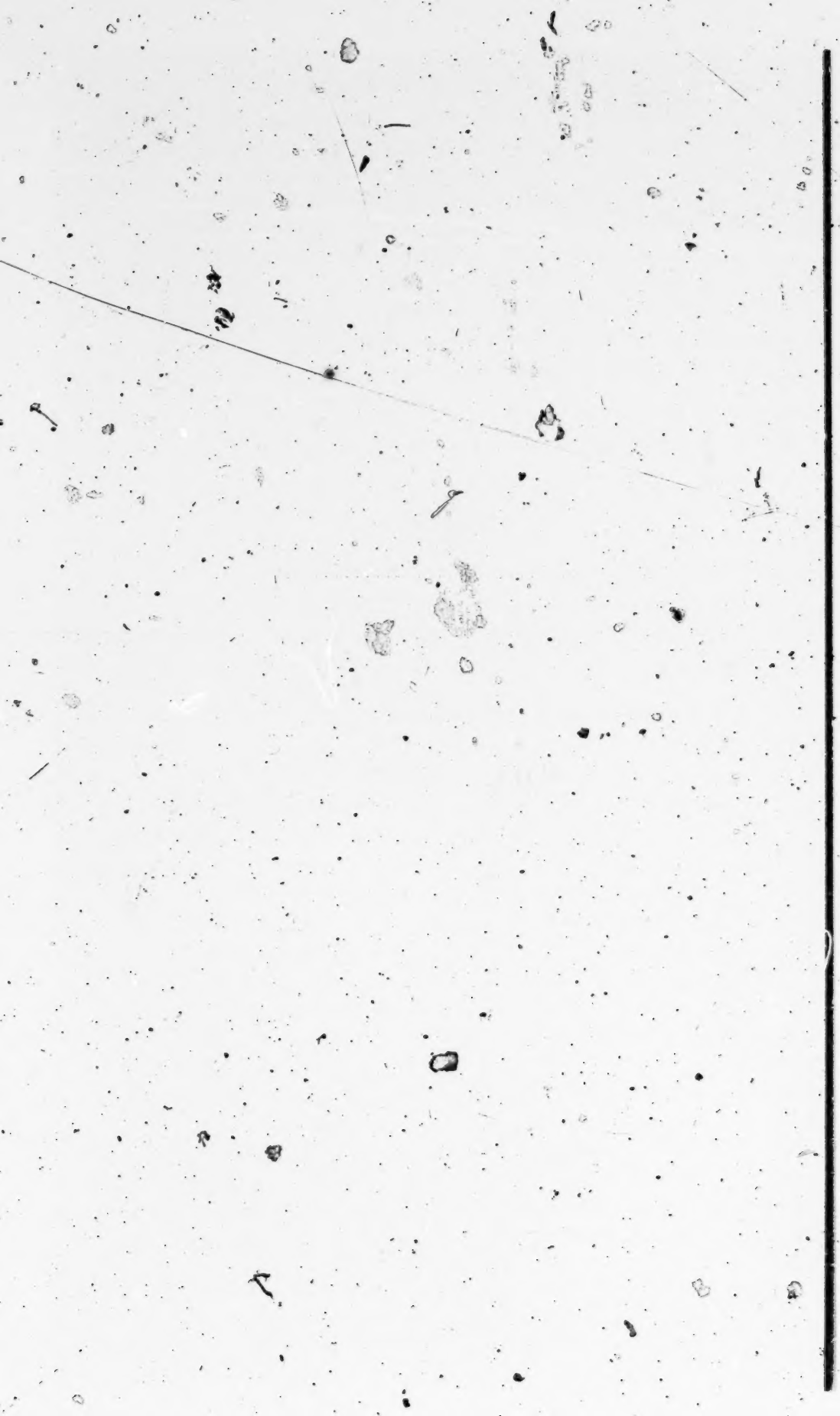
Conclusion.

For the reasons stated above, we submit that the motion of appellee to dismiss the appeal from, or in the alternative to affirm, the judgment of the Supreme Court of Illinois should be granted.

Respectfully submitted,

JOHN R. NICHOLSON,
CHARLES M. NISEN,
Attorneys for Appellee.

Of Counsel:
NICHOLSON, NISEN & ELLIOTT.



APPENDIX.

Article VI, Section 20 of the Illinois Constitution of 1870 reads as follows:

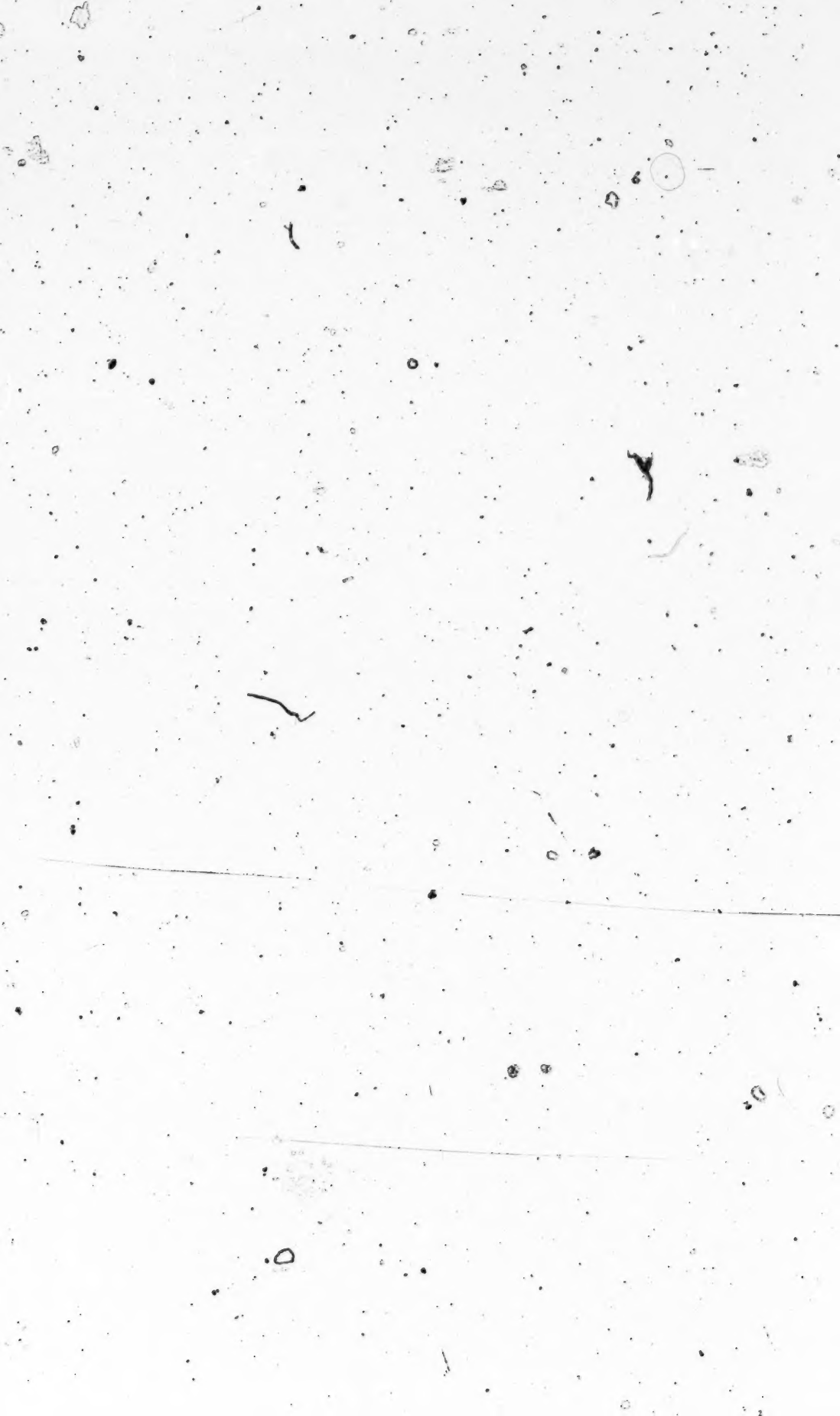
"PROBATE COURTS.

"Sec. 20. The general assembly may provide for the establishment of a probate court in each county having a population of over 50,000, and for the election of a judge thereof, whose term of office shall be the same as that of the county judge, and who shall be elected at the same time and in the same manner. Said courts, when established, shall have original jurisdiction of all probate matters, the settlement of estates of deceased persons, the appointment of guardians and conservators, and settlement of their accounts; in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts." (Ill. Rev. Stats., 1937, page 52.)

Section 5 of "AN ACT in relation to probate courts, defining the jurisdiction thereof, regulating the practice therein, and fixing the time for holding the same" (approved April 27, 1877. L. 1877, p. 79) reads as follows:

"Sec. 5. Probate courts shall have original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators and settlement of their accounts, and in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts. And as soon as such court is organized in any county the county court of such county shall turn over to the probate court all of its probate records, and all files, books and papers of every kind relating to probate matters in such county court, and all records,

files and papers in matters of guardianship and conservators, and the clerk of the probate court shall be authorized to demand and receive from the county clerk all such records, files, books and documents, and upon the receipt thereof, the probate court shall proceed to finish and complete all unfinished business relating to probate, guardianship and conservatory matters in the manner provided by law." (Ill. Rev. Stats., 1937, Ch. 37, Sec. 303, at p. 1023.)



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REPLY OF APPELLEE TO APPELLANT'S ANSWER TO MOTION TO DISMISS OR AFFIRM.

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REPLY OF APPELLEE TO APPELLANT'S ANSWER TO MOTION TO DISMISS OR AFFIRM.

This brief is filed on behalf of Appellee, La Salle National Bank, in response to Appellant's Answer to the Motion of Appellee to Dismiss or Affirm.

STATEMENT.

On September 17, 1957, Appellant filed herein her appeal from the judgment of the Supreme Court of Illinois entered March 20, 1957, in the case entitled "*Gertrude Macdonald, Appellant* v. *La Salle National Bank, Conservator, et al., Appellees,*" reported at 11 Ill. (2d) 122; together with her

Statement as to Jurisdiction in which, at page 4, she stated the Question Presented as being:

> "Is the statutory provision of the State of Illinois that a conservator may be appointed for any person who by reason of any 'physical incapacity or incompetency is incapable of managing and caring for his estate' unconstitutional, being in violation of 'due process of law' as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States?"

On October 21, 1957, Appellee filed herein its Motion to Dismiss or Affirm and Brief in Support Thereof, advancing as grounds for such motion:

> (a) The judgment of the Supreme Court of Illinois rests on an adequate non-federal basis, namely, that appellant failed to show that she was originally adjudged an incompetent (in March, 1938) because of a physical incapacity and therefore failed to show wherein the alleged statutory defect adversely affected her; and
>
> (b) The "due process" question which appellant seeks to present by this appeal is not a substantial federal question for the reason that the statute complained of permitted a conservator of the estate to be appointed only for one found "incapable of managing and caring for his estate," and clearly provided appellant with notice and an opportunity to be heard.

On November 13, 1957, Appellant filed herein her Answer to Motion to Dismiss or Affirm. In that Answer Appellant does not directly treat with or discuss either of the grounds urged in support of the Motion of Appellee to Dismiss or Affirm, but takes the following positions:

(1) At pages 1 and 2 she states that La Salle National Bank neither individually nor as conservator can use bank funds or Appellant's funds to oppose Appellant's personal interest in the case at bar, and that La Salle National Bank cannot properly interject itself in this case "in which it has no interest".

(2) At page 3 of her Answer, Appellant refers to five exhibits filed herein on October 29, 1957, which she has numbered and described as follows:

"EXHIBIT I. Motion of Gertrude Macdonald, to Dismiss the Petition of La Salle National Bank to Oppose Appellant in the Probate Court because of possible '*De Son Tort*' Liability to the bank, individually.

"EXHIBIT II. 'Petition to Vacate and Set Aside Appointments of Conservators of the Person and Estate of Gertrude Macdonald, which Appointments Were Made Without Service of Process on Gertrude Macdonald, Without Giving Her an Opportunity to Be Heard, and Through the Perpetration of a Fraud Upon Gertrude Macdonald and Upon the Probate Court of Cook County, Illinois.' (July 12, 1955.)

"EXHIBIT III. Order entered by the Probate Court on September 13, 1955, continuing the above-captioned petition generally and without date.

"EXHIBIT IV. An Affidavit procured from Annabelle G. Hansen, which evidence substantiates the fraud perpetuated on appellant, as fully described and set forth in Exhibit II.

"EXHIBIT V. Evidence showing attempts made to have the Annabelle G. Hansen Affidavit entered of record."

Said "Exhibits" were not, and do not purport to be, a part of the record that was before the Supreme Court of Illinois in this case. Exhibits IV and V do not purport to be certified by the Clerk of any Court.

From these "Exhibits", Appellant argues that when she was originally adjudged an incompetent in March, 1938, she was not served with process nor given an opportunity to be heard, and therefore this Court should deny Appellant's Motion to Dismiss or Affirm.

Since "Exhibit II" was not filed in the Probate Court of Cook County until July 12, 1955, it seems appropriate to note here that James Macdonald, brother of Gertrude,

was conservator of the estate of Gertrude Macdonald from October 26, 1938 until September, 1951, when he was removed for failure to comply with orders requiring him to account, and La Salle National Bank was appointed, Rec. 3 (19-20). He continued as conservator of her person until removed in the current proceedings, Rec. 3 (23).

ARGUMENT.

I.

The propriety of La Salle National Bank appearing and participating in this case is a non-federal question decided favorably to the Bank by the Supreme Court of Illinois.

In her Brief in the Supreme Court of Illinois, Appellant took the position that La Salle National Bank could not oppose her.

Accordingly, prior to filing a brief, La Salle National Bank, individually, moved for leave to file a brief and filed an affidavit in support thereof, pointing out that in connection with Appellant's Amended Petition filed May 13, 1955, the Probate Court of Cook County had caused a citation to issue to La Salle National Bank to show cause why it should not be removed as Conservator, Rec. 3 (14), and that the order of the Circuit Court of Cook County appealed from decreed that such citation be dismissed, Rec. 3 (23). Appellant filed objections to such motion in the Supreme Court of Illinois. However, one of the Justices of said Court, in vacation, entered an order giving leave to "La Salle National Bank individually, Respondent-Appellee," to file its Brief (see Appendix). The question was not argued further by Appellant in the Supreme Court of Illinois.

Since the notice of appeal to this Court filed by Appellant did not call for the order of the Supreme Court of Illinois giving leave to file its brief to "La Salle National Bank, individually, Respondent-Appellee," and since Appellee had no reason to believe that question would be raised before this Court, said order and the motion and objections preliminary thereto were not designated as a part of the record to be filed with this Court.

However, a copy of the Motion of La Salle National Bank individually for leave to file brief, Affidavit in support, Objections of Gertrude Macdonald, and Order giving leave to La Salle National Bank individually to file brief, all duly certified by the Clerk of the Supreme Court of Illinois, are filed herewith. For convenience, these documents are reprinted in the Appendix hereto.

We respectfully submit that the attack made by Appellant in her Answer to Motion to Dismiss or Affirm on the propriety of La Salle National Bank opposing her appeal to this Court is (1) not within the reasonable scope of the question presented to this Court at page 4 of Appellant's Statement as to Jurisdiction, and (2) involves a non-federal question which was decided favorably to Appellee by the Supreme Court of Illinois.

II.

The question of whether Appellant was duly served with process prior to being adjudicated an incompetent is still pending before the Probate Court of Cook County, was not before the Supreme Court of Illinois, and is not properly before this Court.

The Petition which was the basis of the judgment of the Supreme Court of Illinois appealed from, and which is properly before this Court, is the Amended Petition filed by Appellant in the Probate Court of Cook County on May 13, 1955, Rec. 3 (5-13).

That Amended Petition raised the question of the constitutionality of the statutory definition of an incompetent, and on that ground requested that the Probate Court vacate and set aside the appointment of a conservator for the estate of Gertrude Macdonald.

That Amended Petition does not allege that Gertrude Macdonald is now competent, and does not question the sufficiency of the hearing in March, 1938, respecting incompetency, nor the fact that summons was duly served upon her. In fact, paragraph 2 of that Amended Petition, Rec. 3 (6)—which was signed by Gertrude Macdonald—affirmatively alleges:

> "On the day the petition (meaning the petition praying for a conservator) was filed Gertrude Macdonald was served with a summons."

The Petition referred to on page 3 of Appellant's Answer to Motion to Dismiss or Affirm and there designated as Exhibit II, was filed in the Probate Court of Cook County on July 12, 1955. It alleges (contrary to the allegation of the May 13, 1955 Petition) that Gertrude Macdonald was not served with summons nor given an opportunity to be heard in connection with her adjudication as an incompetent in March, 1938, and requests the Probate Court to vacate the appointment of conservators for her estate on that ground.

As appears from Exhibit III referred to on page 3 of Appellant's Answer to Motion to Dismiss or Affirm, the Probate Court of Cook County continued that second Petition generally by order entered September 13, 1955.

It appears from page 6, *et seq.* of Appellant's Answer to Motion to Dismiss or Affirm that she believes the order of the Probate Court continuing her second Petition generally without date was erroneous and deprived her of rights.

However, it is clear that neither her second Petition filed July 12, 1955, nor the propriety of the September 13, 1955 order of the Probate Court continuing that second Petition generally, is before this Court.[1]

Moreover, at the time the second Petition was filed, and on September 13, 1955, when it was continued generally, Appellant was represented by counsel, who did not withdraw from this case until May 18, 1956, Rec. 3 (17). Quite obviously, there was no point in proceeding on Appellant's second Petition filed July 12, 1955, when she already had an appeal pending from the order dismissing her Amended Petition filed May 13, 1955 which, if successful, would have made a hearing of the second Petition unnecessary.

Further, as pointed out by the Circuit Court of Cook County in its order, Rec. 3 (21-23), that second Petition remains pending and the order of the Circuit Court was without prejudice to any rights of Gertrude Macdonald

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1. The appeal of the order dismissing the Amended Petition filed May 13, 1955, was to the Circuit Court of Cook County, Illinois. On June 27, 1956, that Court entered its order dismissing said Amended Petition originally filed May 13, 1955, Rec. 3 (17-24). Paragraph 12 of that order reads as follows:

> "12. It appears from the findings in the order of the Probate Court entered July 22, 1955, which is here appealed from, that, after that Court had completed hearings on the amended petition of Gertrude Macdonald, which is now here on appeal, and which had been filed in that Court May 13, 1955, a new petition was filed in the Probate Court by Gertrude Macdonald, alleging for the first time that Gertrude Macdonald 'was and is not an incompetent person and not incapable of managing and controlling her person and estate', and also seeking to set aside the appointments of conservators of her person and estate on the ground of fraud. This new petition has been continued generally by the Probate Court, is still pending in that Court, and is not before this Court."

Paragraph D of that order, Rec. 3 (23) reads as follows:

> "D. This order shall not prejudice the right of Gertrude Macdonald to seek an adjudication restoring her competency in a manner provided by law, and shall not prejudice her rights, if any, with respect to the petition presented to the Probate Court July 12, 1955, which is described above."

with respect to that second Petition. It may be taken up and set for hearing on motion of either party.

Therefore, the order of September 13 '1955, continuing her second Petition generally did not deprive Appellant of a hearing on her second Petition. She is free now, as she always has been, to appear on motion at any time and request that her second Petition be set for hearing.

Implicit in Appellant's argument commencing at page 6 of her Answer to Motion to Dismiss or Affirm is the proposition that this Court should not only deny Appellee's Motion to Dismiss or Affirm, but that it should hear on the merits the issues raised by her second Petition and Exhibits I—V which she filed herein October 29, 1957, and which are listed on page 3 of her Answer to Motion to Dismiss or Affirm.

It is axiomatic that this Court, in reviewing a judgment on appeal, will not hear new evidence nor consider anything that was not a part of the record before the Supreme Court of Illinois. *Russell* v. *Southard*, 53 U. S. (12 How.) 139, 159 (1851); *Boone* v. *Chiles*, 35 U. S. (10 Pet.) 177, 208 (1836); *Mutual Life Insurance Co.* v. *Snyder*, 93 U. S. 393, 394 (1876).

Conclusion.

For the reasons stated in the motion of Appellee to dismiss the appeal from, or in the alternative to affirm, the judgment of the Supreme Court of Illinois, and for the reasons stated in Appellee's brief in support of that motion, we again submit that the motion should be granted.

Respectfully submitted,

JOHN R. NICHOLSON,
CHARLES M. NISEN,
Attorneys for Appellee,
La Salle National Bank.

Of Counsel:
NICHOLSON, NISEN & ELLIOTT.

APPENDIX.

The following were filed with, or entered by, the Supreme Court of Illinois on December 6 and 7, 1956:

Motion of La Salle National Bank, Individually, for Leave to File Brief and Any Additional Abstract and to Extend Time for Filing the Same.

Comes now La Salle National Bank, individually, Respondent-Appellee in the above-entitled cause, by Nicholson, Nisen & Elliott, its attorneys, and respectfully moves the Court that La Salle National Bank be given leave to file its Brief and Additional Abstract herein in its individual capacity, and that the time within which it may file such Brief and any Additional Abstract be extended from December 7, 1956, to and including December 27, 1956.

In support of this Motion, there is attached hereto the Affidavit of Charles M. Nisen.

Affidavit in Support of Motion of La Salle National Bank to Extend Time to File Brief and Additional Abstract.

Charles M. Nisen being first duly sworn on oath, deposes and says:

1. That he is one of the attorneys for La Salle National Bank respondent appellee;

2. This appeal is from an order of the Circuit Court of Cook County entered on appeal to that Court from the Probate Court of Cook County, which order dismissed a citation issued by the said Probate Court to La Salle National Bank to show cause why it should not be removed as Conservator of the estate of Gertrude MacDonald, In-

competent, and which order also dismissed and denied the Amended Petition of Gertrude MacDonald filed in said Probate Court seeking to vacate, for want of jurisdiction, various orders entered by that Court appointing Conservators and Successor Conservators, including the order appointing said La Salle National Bank as Successor Conservator.

3. In the Brief of Petitioner-Appellant at page 24, the Ward (citing *Cash* v. *Metropolitan Trust Co.*, 329 Ill. App. 561 (1946)), takes the position that the Conservator may not oppose her Amended Petition which seeks to have declared void her adjudication as an incompetent and the orders appointing Conservators for her.

4. In an effort to avoid the necessity of this Court passing on that issue, La Salle National Bank in its capacity as Successor Conservator, has decided not to file a brief in opposition to the Incompetent in this Court, particularly in view of this Court's order appointing Clarence E. Fox as its *amicus curiae*.

5. However, such *amicus curiae*, by virtue of his position, cannot represent or defend the individual interests of La Salle National Bank, and therefore La Salle National Bank desires to file a brief in its individual capacity. Nothing in the case of *Cash* v. *Metropolitan Trust Co.*, 329 Ill App. 561 (1946) tends to preclude a Conservator from protecting his individual rights, even though such be opposed to the Ward. In the *Cash* case, it appeared that the conservator had on several occasions filed briefs in the various stages of the protracted proceedings without its right to do so being questioned. Only the question of allowance of its expenses was involved in the *Cash* case and then only because the conservator sought to protect the rights of third parties in opposition to its ward.

6. We respectfully suggest that La Salle National Bank in its individual capacity is a "party" within the meaning

of Rule 39 of this Court, and as such is entitled to file a brief. The Judge of the Probate Court of Cook County, upon the filing of the Amended Petition of Gertrude MacDonald here involved, caused a citation to be issued to La Salle National Bank (not as Conservator) to show cause why it should not be removed for the reasons stated in such Amended Petition, and that citation was dismissed by the order of the Circuit Court which is appealed from (Abst. 23). That proceedings for removal of a conservator, guardian, administrator or executor are addressed to the *individual* holding such office is clear from Section 278 of the Probate Act, as well as from the decision in *Hanifan* v. *Needles*, 108 Ill. 403, 409, 410 (1884) where this Court held removal of an executor or administrator without prior service of a citation for removal deprived the individual "citizen" of a right recognized by law.

7. Whether or not La Salle National Bank is to be regarded as a "party" in its individual capacity, we respectfully suggest that it should in equity be granted leave to file a brief in its individual capacity to protect itself against the possible consequences of an adverse ruling of this Court. That this proceeding was initiated and is being carried on with a view to surcharging La Salle National Bank with *de son tort* liability is evidenced from the Circuit Court order appealed from wherein the Ward's sister-in-law, Mrs. Jean MacDonald, stated restoration proceedings were not being sought because they did not want to prejudice the alleged rights of Gertrude MacDonald to attack the validity of appointments of Conservators (Abst. 20, 21); by the fact that Gertrude MacDonald knew she had signed the Petition filed by her but "does not know its contents or purpose" (Abst. 21); and by the fact that the case was argued by the Ward's sister-in-law in the Circuit Court (Abst. 18). That such liabilities as a conservator *de son tort* might be of a

substantial nature is evident from the fact that as Conservator, La Salle National Bank initiated and successfully prosecuted a proceeding to terminate a trust in which the Incompetent was interested, which proceeding was appealed to and affirmed by this Court in the case of *La Salle National Bank, Conservator, etc.*, v. *Jean MacDonald*, 2 Ill. (2d) 581 (1954). Moreover, since that decision, virtually all of the several parcels of real estate in the trust have been sold by order of the Circuit Court. Consequently, La Salle National Bank has a very real interest in the outcome of these proceedings and would be a person aggrieved by any reversal of the Circuit Court order appealed from.

8. Until the appointment of Clarence E. Fox as *amicus curiae* on December 3, 1956, La Salle National Bank was unable to decide whether to seek to file a single brief in this cause both as Conservator and for protection of its individual interests, or to seek solely to protect its individual interests. The preparation of a brief and any additional abstract was necessarily delayed, both for this reason and because the Bank in its capacity as Successor Conservator is represented by different counsel than the counsel which represents the Bank in its individual capacity. An extension of twenty days until December 27, 1956, for La Salle National Bank to file its individual brief herein will not delay the hearing of this cause at the January Term of this Court, particularly since oral argument has not been requested by Petitioner and will not be requested by La Salle National Bank.

Further, affiant saith not.

/s/ CHARLES M. NISEN.

Subscribed and sworn to before me this 4th day of December, 1956.

/s/ GLADYS M. CHRISTIANSEN.
Notary Public.

(NOTARIAL SEAL)

OBJECTIONS OF GERTRUDE MACDONALD TO MOTION OF LA SALLE NATIONAL BANK, INDIVIDUALLY, FOR LEAVE TO FILE BRIEF AND ANY ADDITIONAL ABSTRACT AND TO EXTEND TIME FOR FILING THE SAME.

Now comes Gertrude Macdonald and objects to the motion of the La Salle National Bank, and in support of said objections says as follows:

The La Salle National Bank has an interest in the above entitled cause only as conservator. The said La Salle National Bank is fully aware of the fact that as such conservator it may not oppose the petition of Gertrude Macdonald, for such opposition constitutes a breach of trust on the part of the La Salle National Bank. To circumvent its duty as such conservator, it now asks this Honorable Court to be allowed to file a brief in its individual capacity, although the said La Salle National Bank was never a party in its individual capacity in the above entitled cause and was at all times a party herein in its capacity as conservator. The La Salle National Bank has filed an affidavit in direct contradiction to the record in this case. We submit that *the LaSalle National Bank cannot shirk its duty as a conservator by merely masking itself under the label of "individually."* If this be permitted, then every conservator could oppose the interest of its ward by merely attaching to itself the label "individually," and thus avoid its duty as a trustee and fiduciary.

WHEREFORE, Gertrude Macdonald moves this Honorable Court to deny the motion of the La Salle National Bank.

ORDER GIVING LEAVE TO LA SALLE NATIONAL BANK INDIVIDUALLY TO FILE BRIEF AND ANY ADDITIONAL ABSTRACT AND EXTENDING TIME FOR FILING THE SAME.

This cause coming on to be heard on the motion of La Salle National Bank individually, Respondent-Appellee, supported by Affidavit, for leave to file its Brief and Additional Abstract herein in its individual capacity, and to extend the time for filing the same from December 7, 1956, to and including December 27, 1956, due and timely notice having been given to all persons entitled thereto;

IT IS ORDERED for good cause shown, that leave be, and the same hereby is given to La Salle National Bank individually, Respondent-Appellee to file its Brief and any Additional Abstract herein in its individual capacity, and the time within which such Brief and any Additional Abstract may be filed is hereby extended to and including December 27, 1956.

ENTER:

/s/ WALTER V. SCHAEFER,
Justice of the Supreme Court of Illinois.

December 6, 1956.